Pontiac Osteopathic Hospital *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), AFL–CIO. Case 7–CA–42660

November 14, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On December 14, 2000, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.[1]

We adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its paid-time off (PTO) benefits and procedures without affording the Union an opportunity to bargain with respect to this change and its effects.

As explained below, we agree with the judge that the Union made a timely and sufficient demand to bargain with the Respondent regarding its changes to the PTO policy. Additionally, we find that the Respondent presented these changes to the Union as a fait accompli. We further find that the Union did not waive its right to bargain over these changes.

I. FACTS

On November 8, 1999, the UAW was certified as the exclusive bargaining representative of a bargaining unit consisting of the Respondent's technical employees, about 100 in number. For many years, Local 79, Service Employees International Union (SEIU) has been the bargaining representative of the Respondent's environmental services, dietary, and certain clerical employees.

Since 1996, the Respondent's PTO policy operated as follows: Each employee had a "bank" of PTO hours; the number of hours depended on the employee's length of service and the number of hours worked. When an employee took time off for vacations, holidays, personal days, or sick leave, the hours used were subtracted from that employee's PTO bank. When the SEIU and the Respondent executed a new collective-bargaining agreement in October 1999, it contained changes to the PTO policy, effective January 2, 2000. Preferring a uniform PTO policy for all personnel, the Respondent, sometime before December 8, 1999, decided to apply the PTO policy changes to all employees, including the UAW technical unit. The Respondent's senior vice president of human resources, Eugene B. Kaminski, testified that he had been discussing various aspects of the PTO policy with hospital employees, including those in the technical unit since March 1999.

On December 8, 1999, Kaminski sent a letter to Nancy Schiffer, UAW's associate general counsel. Schiffer, however, did not receive it until December 13, 1999. In the letter, the Respondent discussed, for the first time, its PTO policy with the UAW. The letter states, in pertinent part, as follows:

> Enclosed please find several attached documents for your review. It is the intention of [the Respondent] to unilaterally implement several wage and benefit revisions which would affect classifications both represented and not represented by the UAW. It is important to note the changes reflected include both improved benefits and utilization changes determined necessary in order for [the Respondent] to ensure operational efficiencies. The effective date of these planned revisions is January 2, 2000.
>
> Following your review, should you have any questions or concerns, please contact me at [phone number].

Kaminski attached to the letter, inter alia, a December 8, 1999 memorandum from Kaminski to "All Hourly and Salaried Non-Management Employees." The subject of the memorandum was "Paid Time Off—PTO Benefit Revisions." It stated that "[e]ffective January 2, 2000, several revisions and clarifications to the administration of [the Respondent's PTO] program *will* be implemented." (Emphasis added.) Kaminski also included in the letter a document titled "Personnel Policy No. 660." This document contained the revised PTO policy for "[a]ll hourly and salaried non-management employees." Testimony revealed that the Respondent's employees received this policy in the mail in early December. On December 9, 1999, Kaminski also sent a memorandum to "All Department Heads," "encourag[ing]" them to "provide copies, post and discuss" the PTO policy changes with their respective staffs. The revised PTO policy was posted on various bulletin boards in the hospital. Kaminski testified that, as a practice, he posted only final decisions on bulletin boards.

On December 9, 1999, Mary Jo Rawlings Meida, the UAW's international representative (who had at this point not yet received notice of the change in the Respondent's PTO policy), sent a letter to Kaminski.

[1] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

Kaminski received the letter on December 10, 1999. Meida's December 9, 1999 letter stated, in pertinent part:

> Please consider this a request to begin bargaining a contract between the Technical Employees Bargaining Unit, the Hospital, and the UAW.
>
> To prepare for these negotiations, the UAW will need a list of all employees covered by the bargaining unit, their addresses, Social Security numbers, classifications, and dates of hire. We will need the wage scale for these employees as well as copies of all benefit plans and summary plan descriptions.
>
> Please contact the undersigned . . . to set mutually agreeable dates to begin these important contract talks.

On December 13, 1999, Schiffer received Kaminski's December 8, 1999 letter and showed the material to Meida. Between December 13 and 22, 1999, Schiffer and Meida discussed the changes between themselves and with the Respondent's employees. Also, on two occasions, December 10 and 13, 1999, Kaminski telephoned Schiffer, and left messages notifying her that he was sending "corrections" to the materials previously sent. Schiffer received these corrections on December 14, 1999.

On December 14, 1999, Kaminski mailed the following response to Meida's December 9, 1999 letter:

> I am in receipt of your letter, dated December 9, 1999, regarding your request to begin contract negotiations with the Technical Employees Bargaining Unit. [The Respondent] sent Ms. Nancy Schiffer, UAW Counsel, several communications dated December 8th and 9th which due to business necessity affect classifications within the technical group. Please refer your request to her for further advisement.

On December 22, 1999, Schiffer sent Kaminski a letter that stated the following:

> Your letter to me of December 8, 1999, has been referred to UAW International Representative Mary Jo Rawlings-Meida. She will be the spokesperson for the International Union, UAW for both UAW bargaining units.
>
> As you know, the UAW has been certified as the collective bargaining representative for two separate bargaining units at Pontiac Osteopathic Hospital, the RN's unit and the technical employees unit. These certifications protect the bargaining rights of these employees and prohibit unilateral changes of the sort described in your letter. As the Union was not given the opportunity to bargain before implementation of the changes, the UAW will file charges with the National Labor Relations Board to protect the rights of these employees to bargain about their wages and working conditions. Nevertheless, the UAW does not object to the implementation of any changes announced in your letter which are improvements of existing wages and benefits.
>
> All further correspondence regarding collective bargaining should be directed to Ms. Meida.

Kaminski's office received the letter on December 27, 1999, and Kaminski himself first saw the letter on December 28, 1999. Kaminski never responded to this letter. Thus, between December 22, 1999, and January 2, 2000, no relevant communications occurred between the parties.

The revised PTO policy contained numerous changes. The December 8, 1999 memorandum to employees explained the changes as follows:

> Although there will *not* be a decrease in the number of PTO hours employees enjoy, employees will no longer have a choice when and if PTO hours will be utilized for scheduled and unscheduled absences. The changes that follow include both improved benefits and utilization changes determined necessary in order for [Respondent] to ensure operational efficiencies.

Employees considered several of the changes to be beneficial: (1) the ability to take PTO hours in tenths of an hour, rather than in only 4-hour and 8-hour increments; (2) an increase in the yearly maximum cash-out option for unused PTO; and (3) the option of using PTO for the balance of their shift if management sent employees home early. However, the new policy required employees to take paid-time off on occasions when, under the former policy, employees previously would have had the option of taking unpaid leave. A hospital employee testified that she was "upset" with the changes and expressed concern over having to use PTO time when she did not want to do so.

II. THE JUDGE'S DECISION

The judge held that the Respondent violated Section 8(a)(1) and (5) of the Act by taking unilateral action with respect to the PTO policy, a mandatory bargaining subject, without first bargaining with the Union about the changes. The judge also determined that the UAW had made a timely request to bargain about the PTO changes and that the Respondent failed to respond to the request. Relying on *Armour & Co*., 280 NLRB 824, 828 (1986), the judge stated that the "sequence of events should have left little doubt in the mind of a reasonable person" that the UAW was interested not only in "bargaining a contract," but also in bargaining with the Respondent about the PTO policy.

Specifically, the judge noted that the Union's December 9, 1999 letter requested bargaining, that the date of the letter shows that the Union had not yet received notice of the PTO policy changes, and that the letter's request for copies of all benefit plans suggests an intent to bargain regarding the PTO policy. Further, the Respondent's December 14, 1999 reply to Meida's December 9, 1999 letter shows that the Respondent at least recognized that the UAW wished to discuss the PTO policy, in that the Respondent referred Meida to the PTO material that the Respondent sent to Schiffer. In addition, the Union's December 22, 1999 letter specifically stated that "[a]s the Union was not given an opportunity to bargain before implementation of the [PTO] changes, the UAW will file charges with the [NLRB] to protect the rights of these employees. Nevertheless, the UAW does not object to the implementation of any changes announced in your letter which are improvements of existing wages and benefits." According to the judge, the December 9 and 22, 1999 letters, "when read together and in context," lead to a reasonable conclusion that "the UAW wanted to bargain about the PTO changes which did not constitute improvements." Noting that the Respondent failed to request clarification as to what changes were not improvements, the judge found that the Respondent's withdrawal of the unpaid leave option "could not reasonably be taken as an improvement in the PTO benefits."

The judge also found that the Union was diligent in making its bargaining demand. The judge noted that the Union's December 9, 1999 letter requesting bargaining and benefit information indicated that the Union intended to discuss benefits in the upcoming contract negotiations. Further, the Union, having received the corrected information on December 14, 1999, took a reasonable time to review the information and to discuss the information within the Union and with the Respondent's employees. During this time, the Union received the Respondent's response to the December 9, 1999 letter. The response neither rejected nor agreed to the request to start negotiations, but merely referred to material the Respondent had already sent. In addition, all correspondence occurred during the holiday season, a time when the principals involved in the matter were absent from the office. The judge also characterized the Respondent's response to the Union's request to begin negotiations as "ambiguous." Thus, in light of the Union's two letters to the Respondent, the Union's need to discuss matters with the employees, the disruption of the holiday season, and the Respondent's ambiguous stance on starting negotiations, the judge determined that the Union requested to bargain about the PTO policy and did so in a diligent manner.

III. DISCUSSION

We adopt the judge's findings regarding the Union's timely request to bargain. The judge, having found that the Union made a timely request to bargain, concluded that it was unnecessary to pass on the contention that the Respondent's change in the PTO policy was a fait accompli. However, we find that the facts presented here warrant a finding that the Respondent did, indeed, present the UAW with a fait accompli.

The Respondent contends that the Union waived its right to bargain over the PTO policy changes by failing to make a timely demand to bargain. The issues of "fait accompli," "request to bargain," and "waiver" are related in the sense that a finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver. As stated in *Ciba-Geigy Pharmaceutical Division,* 264 NLRB 1013, 1017 (1982):

> The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli.

In other words, "a union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*," *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981), and "[a]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). See also *Ladies Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) "Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated." Thus, "[w]here notice is given shortly prior to implementation of the change because of a lack of intent to alter its position, then the notice is merely informational about a fait accompli and fails to satisfy the requirements of the Act." *Gannett Co.,* 333 NLRB 355 (2001) (citing *Ciba-Geigy Pharmaceutical Division*, supra).

Here, the Respondent did nothing more than inform the Union about a decision that it had already implemented. The Respondent's December 8, 1999 letter states that "[i]t is the intention of [the Respondent] to unilaterally implement several wage and benefit revisions which would affect classifications both represented and not represented by

the UAW. The effective date of these planned revisions is January 2, 2000." These revisions included the changes in the PTO. Such unequivocal language shows that the Respondent considered the changes to the PTO policy to be a final decision about which it had no intent to bargain.

Further, the context within which the changes occurred also supports a finding that the changed policy was a fait accompli. First, the Respondent desired a uniform PTO policy for all employees, and the decision to make the changes applicable to all employees occurred before Kaminski mailed his December 8, 1999 letter. Second, on December 9, 1999, Kaminski instructed department heads to post the memorandum explaining the revised policy on the Respondent's bulletin boards, an event that ordinarily occurred only when decisions were final. This notice stated that the changes "*will* be implemented" (emphasis supplied), such language again showing the Respondent's intent to effect the change without bargaining. In these circumstances, the Respondent presented the Union with a fait accompli as to the PTO policy changes and did not allow the Union any opportunity to engage in bargaining before implementing that change. Thus, the Union did not waive its right to bargain.

The law is also clear that an employer violates Section 8(a)(1) and (5) of the Act when it unilaterally implements changes to a mandatory bargaining subject without complying with the representative's request to bargain. *NLRB v. Katz*, 396 U.S. 736, 743 (1962). Here, the record supports the judge's finding that the Union timely requested to bargain about the PTO changes and that the Respondent ignored the request. The Union sent two letters to the Respondent. The first letter contained a clear request to begin negotiating a contract and requested information regarding benefits, which included the PTO policy. The December 22, 1999 letter notified the Respondent of the Union's intent to file charges regarding the Respondent's unilateral changes to the PTO policy and also informed the Respondent that the Union did "not object to the implementation of any changes announced in [the Respondent's letter] which are improvements of existing wages and benefits." We agree with the judge's conclusion that the two letters show the Union's desire to bargain about those PTO changes which were not improvements. We also agree that the Respondent's response to the Union's request to begin contract negotiations was, at best, ambiguous regarding the Respondent's willingness to bargain. Further, the Union acted diligently in making its demand, taking only the time necessary to consult within its organization and with the employees. Thus, the Union made a timely demand to bargain, and the Respondent, by unilaterally implementing the changes in the face of that demand, violated Section 8(a)(1) and (5) of the Act.[2]

THE REMEDY

Having found that the Respondent has violated the Act, we shall order that it be required to cease and desist from such conduct, or like and related conduct. Specifically, the Respondent is required to cease and desist from unilaterally changing its PTO policy and procedures without first bargaining to a lawful impasse with the Union.

Affirmatively, we shall require the Respondent to rescind, as to the technical unit, the January 2, 2000 PTO policy changes. However, nothing in this Order will require or permit the Respondent to rescind any term or condition of employment except on the Union's request. The Respondent will also be required to make its unit employees whole for any losses they may have suffered as a result of the Respondent's unlawful unilateral changes in the PTO program and procedures. Such payments are to include interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In fashioning an appropriate remedy, the judge noted that the unilateral change to the PTO policy caused the "substantial injury" of "loss of flexibility in taking time off." To restore this flexibility, the judge recommended in her remedy section that the Respondent be required to:

> permit all incumbent unit employees to take (if they so choose) up to as much time off without pay as they could have taken after January 2, 2000, if the unilateral changes had not been put into effect, and without affecting the unpaid time off they would otherwise be entitled to or their paid time off bank.

We agree with the judge's recommended remedy. The Respondent argues that such a remedy creates a windfall. For example, the Respondent posits that an employee who, after January 2, 2000, used PTO hours for sick leave could say that he or she would not have used the PTO hours for sick leave. Rather, he or she would have taken unpaid time off. The Respondent contends that the inevitable result would be that the Respondent would have to credit that employee's PTO bank with hours for which that employee had already been paid, creating a windfall for that employee.

The Respondent's contention that the remedy creates a windfall to the employees requires a clarification of the order. Employees seeking to restore used PTO hours to

[2] Chairman Hurtgen does not pass on whether the Union made a request to bargain about the PTO. Even assuming arguendo that there was a failure to make such a request, the Respondent's presentation of a fait accompli meant that such a failure was excused and was not tantamount to a license for Respondent to make the unilateral change.

their respective banks may do so only if they pay back the Respondent for the paid-time off. Using the Respondent's example, if an employee who used PTO hours after January 2, 2000, for sick leave states that he or she would have rather used unpaid leave, then he or she could have those PTO hours restored to their bank, provided that the employee reimburses the Respondent for the paid leave. Accordingly, employees seeking to replenish their PTO bank must reimburse the Respondent for any paid leave received by those employees they want restored to their PTO bank.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pontiac Osteopathic Hospital, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs.

"(c) In the manner set forth in the Remedy section of this decision, permit union employees to restore used paid time off to their PTO banks by paying back the Respondent for any used paid time off that they want restored to their PTO bank."

2. Substitute the following for relettered paragraph 2(e).

"(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, with respect to employees in the following unit, change our paid-time off program and procedures unless either (1) that change is agreed to by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL–CIO or (2) we and the UAW have reached a lawful impasse as to contractual negotiations. The bargaining unit is:

> All full-time, regular part-time, and contingent technical employees employed by us at our facility located at 50 N. Perry Street, Pontiac Michigan, including LPNs, telemetry techs, surgical techs, med techs that work as histo technicians, cytotechs, cardiology techs, bio-med techs, nuclear med techs, x-ray techs, respiratory therapists, ct techs, computer coordinator med tech, cardio special procedures tech, x-ray special procedures techs, cardio stenographer, carido cath techs and ultrasound techs; but excluding physicians, RNs, professional employees, all other med techs, skilled maintenance employees, business office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on the UAW's request, rescind as to the unit described above the January 2, 2000 changes in the paid time off program and procedures; but nothing in the Board's Order requires or permits us to rescind any term or condition of the existing paid time off program or procedures except on the UAW's request.

WE WILL make employees in the above-described bargaining unit whole, with interest, for any loss of pay they may have suffered by reason of our unlawful changes in the paid-time off program and procedures.

WE WILL permit all incumbent employees in the above-described unit to take (if they choose), within the timeframe described in the Board's Order and without affecting the unpaid leave they would otherwise be entitled to or their paid-time off bank, up to as much time off without pay as they could have taken after January 2, 2000, if the January 2, 2000 changes had not been put into effect. Unit employees must pay back the Respondent for any used paid-time off that they want restored to their paid-time off banks.

PONTIAC OSTEOPATHIC HOSPITAL

Donna M. Nixon, Esq., for the General Counsel.
John A. Entenman, Esq., of Detroit, Michigan, for the Respondent.
Blair K. Simmons, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me on September 27, 2000, in Detroit, Michigan, pursuant to a charge filed by International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL–CIO (the UAW) against Respondent Pontiac Osteopathic Hospital on December 23, 1999, and amended on March 31, 2000; and a complaint issued on March 31, 2000, and amended on September 27, 2000. So far as material here (see infra fn. 7), the complaint alleges that about January 2, 2000, Respondent changed paid time off (PTO) benefits and procedures provided to employees in the technical unit (see infra Part II A) without affording the UAW an opportunity to bargain with respect to this conduct and its effects, in violation of Section 8(a)(5) and (1) of the Act.

On the basis of the record as a whole, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel), the UAW, and Respondent,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

At all material times, Respondent, a nonprofit Michigan corporation with an office and facility in Pontiac, Michigan, has been engaged in the operation of an acute care hospital. During 1999, in conducting these operations, Respondent derived gross revenues in excess of $250,000, purchased goods and materials valued in excess of $50,000 from points located outside Michigan, and caused these goods and materials to be shipped directly to its Pontiac facility. I find that as Respondent admits, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The UAW is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent employs about 1100 full-time and part-time employees. For many years, Respondent's approximately 200 environmental services, dietary, and certain clerical employees (SEIU unit) have been represented by Local 79, SEIU (SEIU). On the basis of a stipulated rerun election on October 29, 1999, to which no objections were filed, the UAW was certified on November 8, 1999, as the exclusive bargaining representative of an admittedly appropriate unit which is described in Conclusion of Law 3, infra, and which consists essentially of Respondent's technical employees, about 100 in number.

Since 1996, all of Respondent's employees, including the SEIU unit and the technical employees, have been covered by a "Paid Time Off" (PTO) policy. Each employee is assigned a "bank" of paid hours, whose number depends on the employee's length of service and the number of hours worked. Hours used by the employee for vacations, holidays, personal days, or sick leave are subtracted from his "bank." In October 1999, the SEIU and Respondent executed a new collective-bargaining agreement which, as to employees in the SEIU unit, called for certain changes (described infra sec. II,C) effective as of January 2, 2000, in the PTO policy.[2]

For purposes of ease of administration, since at least December 1998, Respondent has preferred to have the same PTO policy for all personnel. Beginning about March 1999 and before the UAW's certification as the representative of its technical unit, Eugene B. Kaminski, who is Respondent's senior vice president of human resources, discussed various aspects of the PTO policy (inferentially, including changes which had been or were being discussed during the SEIU negotiations) with various employees, including technical employees, who were not in the SEIU unit. On an undisclosed date prior to December 8, 1999, Respondent's executive team (which did not include Kaminski) decided to put into effect for all hospital employees the same PTO changes which were called for as of January 2, 2000, in the October 1999 contract covering the SEIU unit.

B. Respondent's Unilateral Action in Applying the PTO Program to Employees outside the SEIU Unit

In connection with the representation case involving the technical unit and another representation case processed at about the same time and involving a registered nurses' (RN) unit (see infra fn. 7), Kaminski's only contact with the UAW had been Nancy Schiffer, who was then the UAW's deputy general counsel.[3] By letter sent via Federal Express to Schiffer dated December 8, 1999 (a Wednesday), but not received by her until Monday, December 13, Kaminski stated:

> Enclosed please find several attached documents for your review. It is the Intention of [Respondent] to unilaterally implement several wage and benefit revisions which would affect classifications both represented and not represented by the UAW. It is important to note the changes reflected include both improved benefits and utilization changes determined necessary in order for [Respondent] to ensure operational efficiencies. The effective date of these planned revisions is January 2, 2000.
>
> Following your review, should you have any questions or concerns please contact me at [giving a telephone number].

[1] Respondent's brief cites several decisions of administrative law judges, which the Board has not reviewed on the merits, and also a memorandum by the General Counsel. Such material has no precedential value. *Marathon Le Tourneau Co.,* 256 NLRB 350, 351 fn. 2 (1981), enfd. 699 F.2d 248 (5th Cir. 1983); *L.C. Cassidy & Son*, 272 NLRB 123, 125 fn. 5 (1984); *Consolidated Casinos Corp.,* 266 NLRB 988 fn. 1 (1983); and *Hotel & Restaurant Employees Local 274 (Stadium Hotel Partners),* 314 NLRB 982, 986 fn. 11 (1994).

[2] My finding as to the effective date is based on credible portions of the testimony of Eugene B. Kaminski, Respondent's senior vice president of human resources, which date is accepted in the briefs filed by Respondent (pp. 3–4) and the UAW (p. 2). At certain points, he testified that as to the SEIU unit, these changes were effective in October 1999.

[3] The UAW's letterhead so described her. Kaminski testified that she was the UAW's "assistant general counsel."

Attached to this letter was a copy of an at least purported memorandum from Kaminski to "All Hourly and Salaried . . . . Employees (Excludes SEIU Employees)," dated December 8, stating that effective January 2 "our pay raise *maximums* will be extended by three percent" (emphasis in original). Also attached to the letter was a copy of an at least purported memorandum from Kaminski to "All Surgical Technicians" (a job classification included in the certified technical unit) dated December 9, stating that it was Respondent's "intention" to increase the shift differential "effective January 2, 2000. This change will be reflected in the paycheck received on January 21." Another attachment to the letter consisted of an at least purported memorandum from Kaminski to "All Hourly and Salaried Non-Management Employees" dated December 8, 1999, on the subject of "Paid Time Off—PTO Benefit Revisions;" before summarizing the PTO changes, this memorandum stated, in part: "Effective January 2, 2000, several revisions and clarifications to the administration of [Respondent's] Paid Time Off (PTO) program will be implemented (see Attached Policy #660)." Also attached to Kaminski's December 8 letter to Schiffer was a document captioned "Personnel Policy No. 660," signed by Kaminski, which codified as to "All hourly and salaried non-management employees" the PTO program set forth in the SEIU contract, which "Personnel Policy" had been distributed in the hospital mail about the first part of December.[4]

A memorandum from Kaminski to "all Department Heads," dated December 9, "encouraged" them to "provide copies, post and discuss," inter alia, the December 8 PTO "Benefit Change Memo" and the "Signed Policy #660 Paid Time Off (PTO)". The record directly shows that these documents were in fact posted during the last week in December, on the bulletin board in the nursing unit to which D'Autremont (a member of the UAW employee bargaining committee; see infra fn. 5) was assigned. The record shows that Respondent maintained bulletin boards in other work areas on other floors, and D'Autremont credibly testified that during her conversations about the PTO changes with employees who worked in such areas, the employees gave fairly accurate descriptions of the changes. I infer that these documents were also posted on at least some of these other bulletin boards. Kaminski testified that it was not his practice to post drafts of proposals on the bulletin board, but that it was his practice to post final decisions.

On receiving this letter and its attachments on Monday, December 13, Schiffer asked UAW International Representative Mary Jo Rawlings-Meida to come to Schiffer's office (in the same building as Meida's) and showed her this material. Thereafter, and before December 22, Meida discussed the changes with about four employees (but not D'Autremont, who was then on vacation) who were members of the bargaining committee.[5] Meanwhile, on Friday, December 10, and again on December 13, Kaminski telephoned Schiffer's office staff and stated that a "correction" of this material was being sent to her. The record fails to show whether he explained the nature of this "correction," which was relevant to the certified technical unit but not to the PTO program.[6] Inferentially, the UAW received the "correction" document about December 14.

On December 9, several days before the Union received Kaminski's letter (dated December 8) with its attachments, Meida sent the following letter to Kaminski, who received it about December 10:

> Please consider this letter a request to begin bargaining a contract between the Technical Employees Bargaining Unit, the Hospital and the UAW.
>
> To prepare for these negotiations, the UAW will need a list of all employees covered by the bargaining unit, their addresses, Social Security numbers, classifications and dates of hire. We will need the wage scale for these employees as well as copies of all benefit plans and summary plan descriptions.
>
> Please contact the undersigned at [giving a telephone number] to set mutually agreeable dates to begin these important contract talks.

Kaminski testified that he understood this letter to be a request to begin bargaining over all terms and conditions of employment. In a reply letter to Meida dated December 14 and received shortly thereafter, Kaminski stated that Respondent had sent Schiffer "several communications dated December 8th and 9th, which due to business necessity affect classifications within the technical group. Please refer your request [to begin contract negotiations as to the technical unit] to her for further advisement."

On September 14, 1999, the UAW had been certified as the representative of a unit consisting essentially of Respondent's registered nurses (the RN unit). By letter to Kaminski dated December 9, and substantially the same as Meida's December 9 letter to Kaminski regarding the technical unit except for the unit involved, Meida had requested Kaminski to begin bargaining with respect to the RN unit. By letter to Meida dated December 14, Kaminski refused "due to the legal challenges previously expressed in this case."

By letter to Kaminski dated December 22, 1999, Schiffer stated:

> Your letter to me of December 8, 1999, has been referred to UAW International Representative Mary Jo Rawlings-Meida. She will be the spokesperson for the International Union, UAW for both UAW bargaining units.
>
> As you know, the UAW has been certified as the collective bargaining representative for two separate bargaining

[4] My finding as to this distribution is based on the testimony of employee Sandra D'Autremont, a licensed practical nurse in the technical unit, who testified that the first time she had seen this document was when she received it "toward the first part of December in the hospital mail."

[5] The employee bargaining committee consisted of most of the employees who had engaged in the organizing effort. Respondent did not become aware of their identity until contract negotiations began in April 2000.

[6] This memorandum (dated December 13) replaced the "Pay Raise Memorandum" (dated December 8) applicable to "all hourly and salaried . . . employees." The December 13 memorandum differed from the earlier version in that the revised version did not specify the size of the extension of pay raise maximums or of the increases to the employees at pay range maximum, and such employees were to receive these increases on their "next anniversary date" rather than in January 2000.

> units at Pontiac Osteopathic Hospital, the RN's unit and the technical employees unit. These certifications protect the bargaining rights of these employees and prohibit unilateral changes of the sort described in your letter. As the Union was not given an opportunity to bargain before implementation of the changes, the UAW will file charges with the National Labor Relations Board to protect the rights of these employees to bargain about their wages and working conditions. Nevertheless, the UAW does not object to the implementation of any changes announced in your letter, which are improvements of existing wages and benefits.
>
> All further correspondence regarding collective bargaining should be directed to Ms. Meida.

Until the September 2000 hearing before me, Respondent never asked the UAW to explain what changes it was referring to when stating that it did not object to "any changes announced in your letter, which are improvements of existing wages and benefits." This December 22 letter states on its face that its was sent by facsimile, but Kaminski testified that his office received it by mail on December 27. On December 23, Schiffer filed on the UAW's behalf the initial charge, alleging (inter alia) that Respondent had violated Section 8(a)(1) and (5) of the Act by unilaterally changing paid-time off benefits and procedures.[7]

Kaminski's office received Schiffer's December 22 letter on Monday, December 27. Kaminski was on vacation on December 24 and 27 and on Friday, December 31. The UAW's administrative offices, where Meida worked, were closed between Monday, December 27, and Friday, December 31, inclusive. Schiffer was not in her office during this period.[8] Kaminski first saw Schiffer's December 22 letter on Tuesday, December 28. He never replied to this letter. He testified that he "assumed" the UAW's offices were closed between Christmas and New Year's Day. During this period, no relevant communications between the parties took place or, so far as the record shows, were attempted. On January 2, 2000, Respondent put into effect for all of its personnel (including those in the SEIU, technical, and RN units) the PTO program, which was included in the SEIU bargaining agreement and was described in Respondent's December 13–14 packets to Schiffer.

In late January 2000, Respondent provided certain information requested by Meida in her December 9 letter. This information did not include information about the PTO program; Kaminski testimonially gave as the reason for this omission that he did not interpret the UAW's request for "copies of all benefit plans and summary plan descriptions" as including the PTO policy, but interpreted the UAW's request as including merely "insured benefit plan documents, inclusive of summary plan descriptions". I do not credit his testimony in this respect, for demeanor reasons and because his memorandum to the employees dated December 8, described the changes in the PTO plan as "PTO Benefit Revisions." In March 2000, Meida requested further information. Kaminski responded to this request.

The parties held their first bargaining session with respect to the technical unit on April 11, 2000, and their second session in May 2000. The PTO policy was not discussed at either of these sessions, which (in accordance with the parties' agreement) were directed to noneconomic issues. As of the September 27, 2000 hearing before me, the parties were engaged in negotiations directed toward a collective-bargaining agreement as to the technical unit. Respondent's April 14, 2000 answer to the complaint, which answer was filed 3 days after the parties' first negotiating session, denies that PTO benefits and procedures constitute mandatory subjects of collective bargaining. However, at the hearing on September 27, 2000, Respondent admitted that such matters are mandatory subjects; see infra section II,D.

C. The PTO Policy Changes Effected on January 2, 2000

Kaminski's memorandum to the employees dated December 8, 1999, and included in his December 13 "packet" to Schiffer, states (emphasis in original):

> Although there will *not* be a decrease in the number of PTO hours employees enjoy, employees will no longer have a choice when and if PTO hours will be utilized for scheduled and unscheduled absences. The changes that follow include both improved benefits and utilization changes determined necessary in order for [Respondent] to ensure operational efficiencies.

Respondent's brief states (p. 4), "On balance, [Respondent] considered the changes negotiated [by the SEIU] to the PTO policy to be beneficial to the employees." Technical unit employee D'Autremont, a licensed practical nurse who was on the bargaining committee, testified that some of these changes were beneficial to employees who wanted to take advantage of them. The changes in which she described as beneficial were as follows: (1) PTO could be taken in tenths of an hour, rather than only in 4-hour and 8-hour increments as previously. (2) The maximum cash-out option per year (that is, the option of obtaining pay for unused PTO in the employee's bank at the end of the year) was increased from 104 hours to 120 hours a year. (3) Employees were given the option, which they had not previously possessed, of using PTO for the balance of their shift when sent home by management because of low census, lack of work, or emergency situations. Changes (1) and (2), at least, had been incorporated into Respondent's October 1999 bargaining agreement with the SEIU at the SEIU's request. Neither the General Counsel's nor the UAW's brief states that the UAW had any objection to the changes specifically described in this paragraph.

However, D'Autremont testimonially expressed dissatisfaction with changes in the PTO policy so as to require employees to use

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[7] As amended on March 31, 2000, the charge alleged, inter alia, that these allegedly unlawful changes were effected in both the technical and the RN units. The complaint alleges unlawful unilateral changes in the RN unit as to PTO benefits and short-term disability insurance; Respondent's answer denies, inter alia, the appropriateness of the RN unit. On this and other grounds, the validity of the RN certification was in the process of litigation at the time of the hearing before me. See *POH Medical Center,* 331 NLRB 451 (2000), 169 LRRM 148 (6th Cir. 2000), pending on petition to review and cross-petition to enforce, Docket Nos. 00–1741 and 00–1947. Prior to the hearing before me, the allegations related to the RN unit in the complaint before me had been resolved in a "contingent settlement agreement."

[8] The record fails to show the procedures in the UAW's legal department during the shutdown. At the hearing before me, the UAW was represented by an attorney whom the letterhead on Schiffer's December 22 letter to Kaminski describes as a UAW associate general counsel.

their PTO hours on occasions when, under the previous policy, they could choose to take unpaid time off instead. Thus, before the changes, an employee who worked for 8 hours on a holiday, for which he was paid time and a half (that is, the equivalent of 12 hours' pay at the regular hourly rate) had the option of merely accepting this 12 hours' pay, or receiving an additional 8 hours of actual pay and having 8 hours deducted from his PTO bank. After the changes, an employee who worked for 8 hours on a holiday always received 20 hours' pay and had 8 hours deducted from his PTO bank, without the option of receiving only 12 hours' pay and leaving his PTO bank intact.[9] Rather similarly, after the changes an employee who called in sick for the day had to take sick pay and to have the hours in question deducted from his PTO bank; before the changes, the employee had the option of using his PTO or taking the day off without pay. Also, after the changes, an employee who went on a medical leave of absence (such as a short-term disability leave or maternity leave) had 40 hours deducted from his or her PTO bank for the first week of such leave; before the changes, the employee could elect to take unpaid leave and have no deductions from his or her PTO bank. As to the substance of the changes described in this paragraph, D'Autremont credibly testified that her biggest concern was "having to use my PTO time at a time when I didn't want to use it." Although incorporated in Respondent's October 1999 bargaining agreement with the SEIU, the changes described in this paragraph had not been requested by the SEIU.

D. Analysis and Conclusions

It is well settled that normally, an employer violates Section 8(a)(5) and (1) of the Act when, following a timely request by his employees' bargaining representative to bargain with respect to a mandatory subject of collective bargaining, he effects a unilateral change as to that matter without bargaining about it.[10] In the instant case, it is undisputed that Respondent made unilateral changes in its PTO plan, and as Respondent admitted at the hearing, such changes constitute a mandatory subject of collective bargaining. *Trojan Mining & Processing*, 309 NLRB 770, 771 (1992), enfd. 993 F.2d 1547 (6th Cir. 1993). Nonetheless, Respondent contends that such changes were not unlawful, on the ground that after receiving notice of Respondent's intention to affect them, the UAW failed to request Respondent to bargain about them.

However, while a request to bargain is at least normally a prerequisite to an employer's duty to bargain, the request need take no special form, so long as there is a clear communication of meaning. *Armour*, supra, 280 NLRB at 828; *MCA Distributing Corp.,* 288 NLRB 1173, 1174 (1988); *NLRB v. Barney's Supercenter, Inc.*, 296 F.2d 91, 93 (3d Cir. 1961); and *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971); and cases cited. Here, as in *Armour,* "This sequence of events should have left little doubt in the mind of a reasonable person that the [UAW] was interested not only in beginning "bargaining a contract," as stated in the UAW's December 9 letter to Respondent, but also in "bargaining with Respondent on the subject of" the PTO program. The December 9 date on this letter must have alerted Respondent to the fact that it had been sent before the UAW received Respondent's initial correspondence (dated December 8) specifying the changes in the PTO program, and the request in the December 9 letter for "copies of all benefit plans" must at the very least have suggested (as in any event would have been likely) that the UAW wanted negotiations on that subject.[11] That Respondent did in fact anticipate that the PTO program would be involved in the contract negotiations sought in Meida's December 9 letter is shown by Respondent's December 14 reply letter. After referring to Meida's "request to begin contract negotiations," Respondent's December 14 letter advised Meida that the material which Respondent had supplied to Schiffer (which material included the PTO changes) "due to business necessity [affects] classifications within the technical group. Please refer your request to her for further advisement." Moreover, after sending Respondent a December 9 "request to begin bargaining a contract," and then receiving the material regarding the PTO changes, the UAW sent Respondent a December 22 letter which stated that the UAW's certification "protect[s] the bargaining rights of [the technical] employees and prohibit[s] unilateral changes of the sort described in your [December 8] letter. As the Union was not given an opportunity to bargain before implementation of the changes, the UAW will file charges with the [NLRB] to protect the rights of these employees to bargain about their wages and working conditions. Nevertheless, the UAW does not object to the implementation of any changes announced in your letter which are improvements of existing wages and benefits." I conclude that read together and in context, the Union's December 9 and 22 letters would mean to a reasonable person that the UAW wanted to bargain about the PTO changes which did not constitute improvements—namely, at the very least, about the employees' loss of options to take unpaid time off and leave their PTO banks untouched. Although Respondent rather disingenuously claims that the UAW's December 22 letter was unclear as to which changes were being complained about, Respondent never asked the UAW for clarification. In any event, Respondent's withdrawal of the employees' unpaid-leave options could not reasonably be taken as an "improvement" in the employees' PTO benefits.

For the foregoing reasons, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing, as to employees in the technical unit, the PTO changes with respect to withdrawal of the option to take unpaid leave instead of using the PTO bank.

Respondent appears to contend that its unilateral action in applying the PTO changes to the technical unit on January 2, 2000, was lawful because the UAW allegedly failed to exercise due diligence in making what I have found to be a request to bargain about such changes. Even assuming that the Union's December 9 bargaining demand, standing alone, did not impose on Respondent the duty to refrain from unilateral changes in the PTO program without bargaining about them, I conclude that due dili-

[9] There is no direct record evidence as to whether holiday work was ever compulsory. However, because the technical unit employees are technicians who work in an acute-care hospital, I infer that on occasion, holiday work was compulsory.

[10] *NLRB v. Central Illinois Public Service Co.,* 324 F.2d 916 (7th Cir. 1963); *McLean v. NLRB,* 333 F.2d 84, 86–88 (6th Cir. 1964); *Armour & Co.,* 280 NLRB 824, 829–830 (1986).

[11] See *Nappe-Babcock Co.*, 245 NLRB 20, 21 (1979).

gence was exercised. That December 9 letter, received by Respondent about the following day, requested the beginning of bargaining negotiations for a first contract, and by asking for information about the employees' current "benefits", represented that the UAW would likely include this subject during forthcoming contract negotiations. About Tuesday, December 14, the Union received Respondent's corrections of certain material in the changes "packet" which the UAW had received on December 13; the UAW had been advised on December 10 that corrections were forthcoming, and had no way of knowing whether they improved or worsened the changes as set forth in the "packet" received on December 13. The recipient of the December 13 and 14 "packets" (Schiffer) discussed them with Meida, who had been assigned to represent the UAW during contract negotiations for both the RN and technical units; and Meida, in turn, discussed them with unit employees on the bargaining committee. Meanwhile, she received from Kaminski a letter unequivocally refusing her bargaining request as to the RN unit, which unit was encompassed in the group dealt with in the December 13 and 14 "packets," and also a letter from Kaminski which neither rejected in terms nor agreed to in terms Meida's request to commence contract negotiations as to the technical unit (as Respondent's brief (p.11) states, emphasis in original, "*not* refusing to bargain concerning the technical unit"), which told Meida that her request to Respondent's vice president, Kaminski, for bargaining negotiations should be referred to UAW Attorney Schifffer, and which (Meida credibly testified) she interpreted as "saying that they weren't going to bargain . . . . I felt that this was an implementation of their unilateral changes that they were going to make to the PTO policy. . . . In two of the letters they talk about the unilateral changes . . . being a business necessity . . . instead of responding with dates for bargaining, I was told to contact [UAW attorney] Nancy Schiffer." Moreover, notwithstanding Kaminski's "business necessity" claim to the UAW, I perceive no particular urgency in applying to the technical employees the newly imposed bar on unpaid time off, rather than delaying it for a few days pending what would appear to be negotiations as to a limited and relatively simple issue. Because UAW attorney Schiffer obviously had to discuss the "packets" with UAW business representative Meida, who was to represent the UAW during bargaining negotiations; because, before the UAW took a position with respect to the "packets," Meida quite reasonably discussed them with some of the employees themselves; because of the unavailability of the principals during part of the period immediately preceding the effective date of the changes as set forth in the "packets" for the not unusual reason of the Christmas—New Year's holidays; because of a mail delay (as to Schiffer's December 22 letter) which could not reasonably have been anticipated; because of Respondent's ambiguous representation to the UAW about whether Respondent would bargain with it at all as to the technical unit; and because there was no particular urgency in imposing on the technical employees the new ban on unpaid time off pending what would not likely have been prolonged negotiations as to this matter, I conclude that the Union exercised due diligence in requesting bargaining as to the PTO program and procedures even assuming that Respondent would otherwise have been free to take unilateral action as to this matter.[12]

In any event, Respondent's unilateral action as to the PTO program and procedures was unlawful even assuming that the UAW's communications with Respondent did not amount to request to bargain about the PTO specifically. As Kaminski admitted, before Respondent took its unilateral action with respect to the PTO program the UAW had unequivocally requested it to perform its statutory duty to bargain for the purpose of reaching what would have been the parties' first collective-bargaining agreement. If such negotiations had already begun, Respondent could not lawfully have unilaterally implemented any change at all as to mandatory subjects of collective bargaining, absent exceptional circumstances or an overall legally cognizable impasse on bargaining for the agreement as a whole. Although the bargaining representative may nonetheless waive its right effectively to forestall such unilateral employer action, a mere failure to make a prior timely request to bargain about the matter as to which the employer made the unilateral change does not constitute such a waiver.[13] As to the rationale for this restric-

[12] Respondent's disingenuous piecemeal alleged reading of the Union's December 9 and 22 letters adds weight to the contention of the General Counsel and the UAW that Respondent's unilateral changes in the PTO were in any event unlawful because the changes were a fait accompli which Respondent had no intention of bargaining about. Among other evidence arguably tending to support this position are the following: (1) For purposes of ease of administration, Respondent preferred to have the same PTO policy for all personnel; (2) Kaminski's December 8 letter to Schiffer stated, "It is [Respondent's] intention . . . to unilaterally implement several wage and benefit revisions which would affect classifications both represented and not represented by the UAW . . . the changes . . . include utilization changes deemed necessary in order for [Respondent] to ensure operational efficiencies"; (3) A notice to employees dated December 8, included in the December 13 "packet" sent to the UAW and posted on the employee bulletin board, which according to Kaminski is used to post final decisions but not draft proposals, stated that the PTO changes "will be implemented" effective January 2, including "utilization changes necessary . . . to insure operational efficiencies"; (4) The decision to change the PTO policy for all employees so as to conform with that set forth in the SEIU contract was made before December 8 by the hospital's executive team, without any reservations shown by the record; and (5) Until the September 2000 hearing, Respondent was taking the position that the PTO policy was not a mandatory subject of collective bargaining. In view of my conclusion that the UAW made a timely request to bargain about this matter, I need not and do not rule on the UAW's and the General Counsel's contention that Respondent presented the UAW with a fait accompli as to these changes and therefore, violated the Act by unilaterally effecting them whether or not the UAW made a timely request to bargain about them.

[13] See generally *Vincent Industrial Plastics,* 328 NLRB 300 (1998), enfd. in relevant part 209 F.3d 727, 734–735 (D.C. Cir. 2000); *Visiting Nurse Services of Western Massachusetts*, 325 NLRB 1125, 1130–1131 (1998), enfd. 177 F.3d 52, 58–59 (1st Cir. 1999), cert. denied 528 U.S.1074 (2000); *Maple Grove Health Care Center*, 330 NLRB 775, 778 (2000); *Bottom Line Enterprises,* 302 NLRB 373, 374–375 (1991), enfd. sub nom. *Master Window Cleaning v. NLRB,* 15 F.3d 1087 (9th Cir. 1984); *RBE Electronics of S.D.,* 320 NLRB 80, 81 (1995); *Burrows Paper Corp.,* 332 NLRB 82, 83 (2000); *Sartorius, Inc.,* 323 NLRB 1275, 1275 fn. 4, 1284–1285 (1997); *Intermountain Rural Electric,* 305 NLRB 783 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

tion on unilateral action during contract negotiations, the First Circuit stated, in *Visiting Nurse Services,* supra, 177 F.3d at 59:

> Collective bargaining involves give and take on a number of issues. The effect of [the respondent employer's] position [that the parties to contract negotiations are at a legally cognizable impasse as to a particular issue merely because the union rejects or does not accept the employer's position on that issue] would be to permit the employer to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items. In addition, it would undercut the role of the Union as the collective bargaining representative, effectively communicating that the Union lacked the power to keep issues at the table.
>
> In rejecting another employer's argument that it could unilaterally change a term or condition of employment as soon as the union was notified of the intended change and given an opportunity to bargain, the NLRB stated [in *Winn-Dixie Stores, Inc.,* 243 NLRB 992, 974–975 (1979)]:
>
> By utilizing this approach with respect to various employment conditions seriatim, an employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the bargaining representative of its employees and itself . . . . [U]nder this approach, form, rather than substance, becomes the determinative factor in deciding whether the bargaining obligation has been fulfilled. In consequence, meaningful collective bargaining is precluded and the role of the bargaining representative is effectively tainted.

To be sure, in the instant case, face-to-face bargaining negotiations had not yet begun. However, the UAW had already requested the commencement of negotiations for a contract and had asked Respondent to submit employee information (including "benefit plans") relevant for that purpose; and in advising the UAW about the changes effected by Respondent 2 or 3 weeks later in the PTO program and in other matters which were mandatory subjects of collective bargaining, Respondent had perforce advised the UAW of Respondent's current practices as to these matters. Moreover, because Respondent and the UAW were to begin efforts to obtain a first contract, their obligations were not subject to the stabilizing influence of Section 8(d)(4) of the Act, which requires parties to a previously executed contract to "continue in full force and effect . . . all the terms and conditions of the existing contract for a period of 60 days after [notice to the Federal Mediation and Conciliation Service] is given or until the expiration date of such contract, whichever occurs later." Accordingly, the likely effect of Respondent's conduct as to a single likely bargaining issue shortly before the beginning of face-to-face negotiations for a complete contract was much the same on the subsequent negotiations as such conduct would have had if Respondent had acted shortly after face-to-face negotiations began, in which event, the cases cited infra fn. 13 would call for a finding that such conduct violated Section 8(a)(5) and (1) of the Act. In any event, for reasons set forth infra in the remedy section of this decision," this line of cases affects the appropriate remedy.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The UAW is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and contingent technical employees employed by Respondent at its facility located at 50 N. Perry Street, Pontiac, Michigan, including LPNs, telemetry techs, surgical techs, med techs that work as histo technicians, cytotechs, cardiology techs, bio-med techs, nuclear med techs, x-ray techs, respiratory therapists, ct techs, computer coordinator med tech, cardio special procedures tech, x-ray special procedures techs, cardio stenographer, cardio cath techs and ultrasound techs; but excluding physicians, RNs, professional employees, all other med techs, skilled maintenance employees, business office clerical employees, guards and supervisors as defined in the Act.

4. At all times since October 29, 1999, based on Section 9(a) of the Act, the UAW has been the exclusive collective-bargaining representative of the unit described in Conclusion of Law 3.

5. About January 2, 2000, Respondent violated Section 8(a)(5) and (1) of the Act by changing paid time off benefits and procedures provided to employees in that unit without complying with the UAW's request to bargain.

6. The unfair labor practice described in Conclusion of Law 5 affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, and like or related conduct. Where the employer's unlawful unilateral conduct as to a particular subject has taken place in the absence of a context of bargaining for an overall bargaining agreement, at least ordinarily the Board's cease-and-desist order permits the employer to engage in unilateral conduct after a legally cognizable impasse as to that subject. However, after Respondent's unlawful unilateral change in paid-time off benefits and procedures, the parties' participation in face-to-face negotiations precluded any unilateral conduct in the absence of an impasse in contractual negotiations as a whole; see supra part II, D. Respondent's right to engage in unilateral conduct will be limited accordingly.

Affirmatively, Respondent will be required, on the UAW's request, to rescind as to the technical unit the January 2, 2000 changes in the paid-time off program and procedures; provided, however, that nothing in this Order will require or permit Respondent to rescind any term or condition of employment except on the UAW's request. In accordance with the General Counsel's specific request set forth in the complaint, Respondent will also be required to make its unit employees whole for any losses they may have suffered in consequence of Respondent's unlawful unilateral changes in the PTO program and procedures. Such payments are to include interest in the manner described in *New*

Horizons for the Retarded, 283 NLRB 1173 (1987). However, such a requirement does nothing to alleviate what may have been the most substantial injury which the unilateral changes imposed on employees—namely, the loss of flexibility in taking time off. While this injury cannot be wholly made up for, my recommended Order will attempt to afford partial compensation for the employees' loss of flexibility after December 1999. Accordingly, Respondent will be required to permit all incumbent unit employees to take (if they so choose) up to as much time off without pay as they could have taken after January 2, 2000, if the unilateral changes had not been put into effect, and without affecting the unpaid time off they would otherwise be entitled to or their paid-time off bank. Such unpaid time off is to be permitted beginning on the date on which Respondent commences compliance with this Order, and for a subsequent period equal to the time during which Respondent has unlawfully maintained the unilateral changes in effect. In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Pontiac Osteopathic Hospital, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) With respect to employees in the following unit, unilaterally changing Respondent's paid-time off program and procedures before reaching a legally cognizable impasse as to contractual negotiations with International Union, Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL–CIO. The bargaining unit is

> All full-time, regular part-time, and contingent technical employees employed by Respondent at its facility located at 50 N. Perry Street, Pontiac, Michigan, including LPNs, telemetry techs, surgical techs, med techs that work as histo technicians, cytotechs, cardiology techs, bio-med techs, nuclear med techs, x-ray techs, respiratory therapists, ct techs, computer coordinator med tech, cardio special procedures tech, x-ray special procedures techs, cardio stenographer, cardio cath techs and ultrasound techs; but excluding physicians, RNs, professional employees, all other med techs, skilled maintenance employees, business office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the UAW's request, rescind as to the unit described above the January 2, 2000 changes in the paid-time off program and procedures; provided, however, that nothing in this Order shall require or permit Respondent to rescind any term or condition of the existing paid time off program or procedures except on the UAW's request.

(b) In the manner set forth in the remedy section of this decision, make employees in the above-described bargaining unit whole for any loss of pay they may have suffered by reason of Respondent's unlawful unilateral changes in the paid time off program and procedures.

(c) In the manner and with the limitations set forth in "The Remedy" section of this decision, permit all incumbent unit employees to take (if they choose) up to as much time off without pay as they could have taken after January 2, 2000, if the unilateral changes had not been put into effect.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, paid time off records, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amounts due, and the unpaid time off which employees must be permitted to take, under the terms of this Order.

(e) Within 14 days after service by Region 7, post at its facility in Pontiac, Michigan, copies of the attached noted marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Pontiac facility at any time since January 2, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."